

BEFORE THE  
**Federal Communications Commission**  
 WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
 Implementation of )  
 Commission's Equal )  
 Employment Opportunity Rules )

MM Docket No. 94-34

To: The Commission

**COMMENTS OF KTEM RADIO, INC.  
 AND WALKER COUNTY COMMUNICATIONS, INC.**

KTEM Radio, Inc., ("KTEM Radio") licensee of Stations KTEM(AM) and KPLE(FM), Temple, Texas and Walker County Communications, Inc., ("Walker County") licensee of KSAM(AM) and KSAM (FM), Huntsville, Texas, hereby submit their Comments concerning the Commission's Notice of Inquiry In the Matter of Implementation of Commission's Equal Employment Opportunity Rules, released April 21, 1994 (the "Notice of Inquiry").

1. In its Notice of Inquiry, the Commission seeks comment on "the effectiveness of the Commission's rules, procedures, policies, standards and guidelines in promoting equality of employment opportunity and promotion opportunity in the cable and broadcast industries." It further seeks comment "regarding possible changes to the Commission's EEO rules, policies and enforcement thereof," including the EEO Policy Statement, 9 FCC Rcd 929, issued on February 1, 1994.

2. The EEO Policy Statement established guidelines for assessing forfeitures for violations of the Commission's

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broadcast EEO Rule, including circumstances which merit an upward or downward adjustment in the amount of the forfeiture. At the same time, the Commission issued fines based upon the new EEO Policy Statement to, among others, both KTEM Radio and Walker County for violations of the EEO policies set forth in the EEO Policy Statement even though those policies were not in existence during their 1983-1990 license renewal period.

3. Both KTEM Radio and Walker County welcome the opportunity to comment upon more effective mechanisms to reach the Commission's goal of implementing its EEO rule. These Comments address the unfair retroactive application of the Commission's new policies and seek a more appropriate Commission approach toward EEO in small markets.

#### **I. THE NEW STANDARDS SHOULD NOT BE APPLIED RETROACTIVELY**

4. The Commission's EEO Rule and EEO Policy Statement further the important goal of "enhanc[ing] access by minorities and women to increased employment opportunities." EEO Policy Statement, 9 FCC Rcd at 929. However laudable its goals, the EEO Policy Statement should be applied prospectively only. Applying the EEO Policy Statement retroactively serves to impose substantive new obligations upon radio stations with renewals pending for license periods ending years before the Commission even anticipated its new forfeiture policy.

5. The Supreme Court ended all confusion as to the issue of retroactivity in its April 26, 1994 decision in Landgraf v. USI Film Products, No. 92-575 (April 26, 1994); see also Rivers

v. Roadway Express, Inc., No. 92-938 (April 26, 1994). In Landgraf, a female employee who resigned from her factory job following incidents of sexual harassment (Landgraf) was suing her employer for back pay. Landgraf's appeal was pending in the Fifth Circuit at the time the Civil Rights Act of 1991 was signed into law. The 1991 Civil Rights Act provided additional remedies for sexual harassment, and Landgraf argued that her appeal should be remanded for decision based on the new Civil Rights Act. Determining that Landgraf could not benefit from the additional, newly available remedies, the Court of Appeals decided that "it would be unjust to apply this kind of additional and unforeseeable obligation to conduct [of the employer] occurring before the effective date of the Act." Landgraf v. USI Film Products, 968 F.2d 427, 432-33, aff'd., No. 92-757 (April 26, 1994).

6. The Supreme Court availed itself of the opportunity to clarify that statutes affecting substantive rights should not be applied retroactively absent the express intention of Congress. In the absence of such express language, "our traditional presumption teaches that [retroactivity] does not govern absent clear congressional intent favoring such a result." Landgraf, slip. op. at 36. A determination of whether a statute has an illegal "retroactive effect" is based on "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, slip. op. at 36.

7. In this case, the forfeitures assessed under the new EEO Policy Statement certainly increased the liability of radio stations operated by KTEM Radio and Walker County for conduct which occurred between 1983 and 1990. During the time that the renewals were pending, both the Commission's forfeiture authority and the nature and amount of the fines imposed have increased dramatically. Four years after filing its renewal, KTEM Radio and Walker County were each sanctioned for failing "to attract an adequate pool of minority/female applicants or hires for at least 66% of all vacancies during the license term being reviewed." However, this standard, which the licensees allegedly failed to meet, was not even in existence between 1983 and 1990 -- the license renewal period in question. Accordingly, this is just the type of situation contemplated by the Supreme Court in its recent pair of decisions reiterating a presumption against the retroactive application of substantive changes in the law.

**II. THE COMMISSION'S EEO POLICY SHOULD BE MORE RESPONSIVE TO SMALL MARKET NEEDS**

8. Currently, the Commission does not differentiate between the standards and fines applicable to large versus small markets in its Rules and EEO Policy Statement. While standard treatment may be theoretically appealing, the economic reality is devastating to small market licensees. As the Commission is undoubtedly aware, the economic climate in the past several years has not been favorable to small market broadcasters. Our stations have reduced staff, cut budgets, and struggled to attract advertising dollars. Many times, we have hired

individuals with the experience and ability to do more than one job, thereby reducing even further the already limited applicant pool. The Commission's EEO policy should not create another hindrance to the management of small market stations.

9. KTEM Radio operates stations licensed to Temple, Texas (population 47,300), and Walker County operates stations licensed to Huntsville, Texas (population 27,925; including prison population 6,169). Although the Commission found that KTEM Radio "recruited, hired and employed minorities," KTEM Radio was fined \$25,000 because its recruitment efforts in the 1980's were deficient by the February 1994 standard. Memorandum Opinion and Order, FCC 94-17 (released February 1, 1994). The fine imposed on KTEM Radio represents more than the station's profits for the entire year of 1993. KTEM Radio makes strong efforts to recruit from the organizations and educational institutions that specialize in minorities and females. The stations recruit from all local sources of which they are aware. Unfortunately, despite our use of these sources, many times we have few or no minority referrals. Now, by levying a \$25,000 fine, the Commission is thwarting the very goal it seeks to foster: KTEM Radio will be unable to offer its staff promotions or pay raises, and the hope of staff expansion has been destroyed.

10. Similarly, Walker County was fined \$31,250 for EEO shortcomings at its Huntsville, Texas stations and given a short-term license renewal. Id. In Huntsville, however, the state prison is the major employer, hiring over 5,000 local employees,

followed by Sam Houston State University which hires nearly 2,000 local employees. Walker County must compete with these far larger employers, as well as local hospitals and businesses, for a limited pool of qualified applicants. In particular, the Huntsville prison system offers very well-paying jobs with excellent benefits.

11. Although they operate in significantly smaller markets with the accompanying smaller applicant pools and hiring needs, KTEM Radio and Walker County were fined amounts as much as or greater than stations in large urban markets, such as KUSC(FM), Los Angeles which received a \$17,500 fine, KFSD(FM), San Diego which received an \$18,750 fine, and six stations in New York which received fines ranging from \$23,750 to \$25,000 for failing to recruit an adequate pool of minority applicants.

12. Licensees in smaller markets are less able than their Top 100 market counterparts to withstand the financial blow of increased fines; they are certainly not deserving of higher fines for the same behavior as licensees in the top markets. Small market licensees are less able to generate additional advertising revenue on short notice, or to cut back on extraneous production costs. KTEM Radio and Walker County have proudly resisted the trend toward operation by satellite network to provide fuller service to their communities in terms of local news, talk, PSAs, interviews, editorials, contests and promotions. In fact, the Associated Press Managing Editors awarded KTEM Radio national recognition for its news coverage in 1992. Because of extremely

tight operating budgets, a hefty fine will directly trade off with station services like the award-winning news programming as well as employment opportunities. In reaction to severe EEO fines, small market licensees may be forced to operate by satellite network, thereby reducing their employment needs (and community responsiveness) significantly.

13. Both KTEM Radio and Walker County operate in communities with large and growing Hispanic populations. Because the Hispanic population travels to Texas from Mexico, the new residents frequently have little or no English language skills. As the workforce ratio changes to reflect this influx of Spanish-speaking Mexicans, many radio stations will be hard pressed to get their employment statistics into parity with the workforce percentage of Hispanics. KTEM Radio and Walker County suggest that the parity statistics reflect only the female and minority labor force population with the requisite language skills to perform any station job. It is virtually impossible for our stations, in this time of budget cutbacks, to create station hiring parity with a minority population in which a large percentage of the minority group is unable to perform work in an English-language environment.

14. A more realistic EEO policy would also offer smaller market radio stations some relief from the pressure of voluminous filing and record-keeping so that they may operate in a reasonably profitable manner while seeking women and minority candidates for job openings. For example, the Commission should

credit part-time employees in assessing a station's EEO compliance. Part-time work is an excellent break into the communications industry and can serve as a stepping stone for permanent employment, either at that station or elsewhere. Thus, women and minorities in part-time positions in small market stations should help fulfill the Commission's EEO requirements.

15. Additionally, small market radio stations frequently operate with a large percentage of part-time workers, particularly on weekend and round-the-clock shifts. It is therefore more difficult for the remainder of the staff to cover shifts when a worker leaves unexpectedly. Smaller stations do not have the luxury of conducting lengthy searches for the "perfect" candidate; we must sometimes fill a position as quickly as possible. This situation makes it nearly impossible to comply with elaborate and time-consuming Commission rules and regulations concerning "adequate pools" of applicants and interviewees without substantially hindering the operation of our station. Moreover, the appropriate time lapse between the creation of a job opening, recruitment for the position, and the actual hiring of an employee remains unclear. Frequently, few if any applicants apply for a particular position and the "right" candidate is the first person with the requisite skills to apply.

16. Record-keeping requirements and percentage-of-pool requirements should therefore be relaxed for stations in small markets. A small market station should be permitted to submit more than three years' history of employment, if it desires, to



demonstrate its efforts to recruit and maintain a diverse group of employees.<sup>1/</sup> If a station has met the goal of adequate minority and female hires, it seems irrelevant and even counterproductive to investigate how the station reached that goal. A more effective mechanism to promote EEO would be to require annual reports to the Commission with full applicant search disclosure for stations that do not meet the parity requirement for more than any one year in its previous seven-year license period.

17. In general, many aspects of the Commission's EEO Rule remain unclear. Small market stations need clarification of the number of applicants required to constitute a "pool" of applicants. Given that small markets can seldom generate a substantial pool of applicants, we request that the Commission place a limit on the length of time a job must be held open while the licensee attempts to recruit an appropriate pool. In addition, small market licensees would benefit from Commission guidance on the number of organizations that should be contacted in a licensee's effort to create its pool, and how long it must search for a qualified female or minority applicant before hiring an available, qualified male, non-minority applicant.

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<sup>1/</sup> A requirement that all stations submit such data would only further delay the license renewal review process. Significantly, it took the Commission four years to evaluate the three years' worth of data that KTEM Radio and Walker County supplied with their 1990 renewal applications.

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18. Overall, emphasis on process rather than results is very costly to small market stations. At KTEM Radio, for example, our staff has documented over \$3,500 spent seeking additional applicants for job openings in the last year. Many local minority organizations have no listing in the phone book and it is difficult to find a spokesperson or president of the groups. Renewed interest by these groups as well as closer liaison with high school educators is one way to strengthen the applicant pool. Sadly, the clear intent of EEO would be lost, if, in fact, it becomes a numbers game in which the station which keeps the best records wins, and the station with minority hires but little documentation is fined so heavily it is forced to go dark.

#### IV. CONCLUSION

For the foregoing reasons, KTEM Radio and Walker County believe that the Commission has applied the EEO Rule and EEO Policy Statement against them in violation of the principles of retroactivity. Moreover, the current fine schedule and the manner of producing adequate pools for job hires is not realistic in smaller markets with the economic constraints of the profession and the competitive constraints of the marketplace.

Respectfully submitted,



Clint Formby, President  
KTEM Radio, Inc. and  
Walker County Communications, Inc.

**CERTIFICATE OF SERVICE**

I, Jackie Haskins, a secretary of the law firm, Fisher Wayland Cooper Leader & Zaragoza L.L.P. hereby certify that I have, this 13th day of June, 1994, caused to be sent by United States first class mail, postage prepaid, a true and correct copy of the foregoing "**COMMENTS OF KTEM RADIO, INC. AND WALKER COUNTY COMMUNICATIONS, INC.**" to the following:

\*Roy Stewart, Esq.  
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1919 M Street, N.W., Room 314  
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\*The Honorable Reed Hundt  
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\*The Honorable James H. Quello  
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Jackie Haskins

\*By Hand Delivery